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No 901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

PETITION FOR REHEARING OF ORDER GRANTING THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND REVERSING THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
JOSEPH APPEL,
ARTHUR STEINBERG.

INDEX.

TABLE OF CASES CITED.

Thus, this Court in passing upon the application for the writ of certiorari reversed the determination of the highest Court of the State of New York, without the respondents having had an opportunity to present fully their version of the case and the abundance of authority both from this Court and the State Courts in support of the judgment rendered in favor of the respondents. The only brief submitted by respondents was in opposition to the original writ of certiorari and there the brief was based principally upon the jurisdictional defect of the application and in view of that, the respondents only touched very lightly upon the questions of labor law involved.

The application by the petitioners was based upon a distorted version of the evidence adduced at the trial and of the findings of fact and conclusions of law. In their petition and brief they relied upon a set of facts which does not exist as far as the issues in this case are involved.

Briefly, the material facts pertaining to this action are as follows:

The respondents for many years have earned a livelihood, each working alone in the sale of bakery products to retail stores. Each of the respondents purchased his products from various bakers and in turn sold them to retail store keepers (R. 47, 48). A representative of the Union approached the respondents and demanded that each of them employ a Union man one day per week at the rate of $9.00 per day. The respondents refused upon the ground that they could not afford to do so and also that they had been working alone for many years without any assistance of any kind and did not require the services of any person other than themselves in the normal conduct of their business (R. 70, 71, 103, 115). The Union representatives threatened the respondents that unless they furnished such employment the Union would picket their customers and threatened to picket the bakeries that sold them products. Immediately after the respondents' refusal to acquiesce to

these demands the Union caused pickets to picket some of the bakeries from whom the respondents purchased their products for resale and also threatened a number of customers of the respondents with picketing in the event they would continue to do business with the respondents (R. 48, 49).

The Trial Court found that the immediate and primary purpose sought to be accomplished by the Union was to compel the respondents to employ help they did not need or require in the conduct of their business. The Court in its opinion said: "The proof is that the defendant threatens to picket these manufacturers and the various customers of the plaintiffs unless each of the plaintiffs employ a member of the defendant union one day a week to assist them" (R. 180). The Union introduced some evidence concerning general trade practices involving peddlers and the effect of peddling on the standards maintained by Union workers and sought to justify their demands upon the respondents by relying upon a belated claim of alleged evils of the peddler system. However, the Court found that the primary purpose of the Union was to compel the respondents to hire unnecessary help—a practice indulged in by many Unions in the State of New York and which has been condemned as being an unlawful purpose. The attempt of the Union to change its position after litigation was commenced by creating a straw man in the peddling situation which they alleged existed, was insufficient to deter the Trial Court from determining the true intent of the combination. The Trial Court refused to find, at the request of the Union, that the purpose of this picketing was to eradicate the peddler system. The Union requested the Court to find that it had "solely acted with the desire and purpose of maintaining Union wages, hours and conditions and in the definite belief that the extension of the peddler system, uncontrolled and unregulated, already has partially weakened the maintenance of this Union's wages,

etc." (R. 35, 36). The Union further requested the Court to find "that the defendants in acting as hereinafter mentioned did so solely with the view of attaining the aims and purposes of the Union heretofore mentioned and to promote the welfare of bakery drivers" (R. 38). This, the Court refused to find as the uncontradicted evidence clearly showed that the true purpose of the Union was to force defenseless and helpless independent dealers to pay monies for services which were not required in their business. Other efforts of the Union to have the Court find that the sole purpose of the picketing was to remove the peddler system and that the action of the Union "could reasonably be expected to aid" in this purpose, were refused (R. 42). The findings of the Trial Court were affirmed on appeal and established the fact that the purpose of the demands made upon the respondents was to compel them to hire unnecessary help and that inasmuch as they had employed no help any picketing in furtherance of this purpose was unlawful. In attempting to justify their demands, the Union relied upon general trade conditions regarding the peddler system. Some of these general conditions are included among the findings. However, none of them show that the purpose of the picketing was to cure such alleged evil, despite the fact that the petitioners in their application stretched and distorted the findings to make it appear that it did. The fact is that the Court expressly refused to find that to be the purpose of the picketing with respect to these respondents. The Court saw through the veil of this sham defense, and that it properly perceived the real purpose of the picketing, is borne out by the fact that the Union did not picket generally in the trade protesting against the alleged evils of the peddler system, as other unions have done. Instead it tried to force these respondents to pay monies for unnecessary help. The reason for the picketing was fixed by the mouths of the representatives of the Union (R. 71, 103). They did not advise the

respondents that they were a menace to Union standards. All they discussed and tried to obtain was employment, the respondents did not need or desire to furnish.

Grounds for Rehearing.

(a) The respondents did not have an opportunity to present to this Court all the material facts in support of the judgment they had obtained, as well as the authorities in support thereof.

(b) The petitioners' application was based upon facts not found in the record and upon a misstatement and distortion of the testimony and findings of fact and conclusions of law.

(c) Petitioners made it appear that the New York Court of Appeals favored the granting of an injunction restraining picketing where no employer and employee relationship existed. This is not the fact. That Court restrained picketing when no employer or employee relationship existed only where the purpose of picketing was to accomplish an unlawful end.

(d) The sole question involved herein was whether an employer may perform all his work with his own hands without being molested by picketing by a Union which seeks to compel an employer to refrain from working part of the time and furnishing such employment to a member of the Union. This Court has held that such question is one of local policy solely for the highest Court of the particular state where such case arises. The local policy of that State which will not be interfered with by this Court (*Senn* v. *Tile Layers Protective Union, Local No. 5*, 301 U. S. 468).

(e) Will picketing in furtherance of an unlawful purpose be permitted under the protection of freedom of speech?

(f) This Court based its reversal of judgment on the case of *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940) on the theory that peaceful picketing is permissible where no employer or employee relationship exists. It is submitted that the *Swing* case has no application to the case at bar because the absence of an employer and employee relationship will not sustain picketing where it is for an unlawful purpose. The New York Court of Appeals has for many years followed the law as laid down in the *Swing* case, except in situations where employers have conducted their business without help of any kind, the said Court has restrained all efforts of labor unions to coerce such employers into hiring unnecessary help in their business.

These grounds are more fully dealt with in the brief hereto annexed.

The Effect of the Reversal Upon the Multitudes of Small Business Enterprises in the State of New York and Its Resulting Social Evil.

This dispute arose in the City of New York with its more than several millions of inhabitants. New York City, the largest city in the world, is a highly industrialized and commercialized community. In the past five years, during the rapid rise of labor unions throughout the country, Unions have also made marked progress in the City of New York. As Unions grew in power and increased their membership rolls, the number of unemployed members of unions rose. It is common knowledge that within the City of New York there are situated tens of thousands of individuals operating small businesses alone without hiring any help except for occasional assistance of a spouse or a child. Included among such businesses are numerous retail stores and small one-man businesses. Unions in an effort to alleviate their unemployment made it a practice

to compel persons who were operating a one-man business without help, to hire unemployed members of the Union anywhere from one day a week to six days per week throughout the year. The mere threat of a picket was sufficient in many instances to compel acquiescence to the demands of the Union. Such activities had no immediate and reasonable relation to the lawful Union objectives to increase wages and to secure more favorable terms of employment as far as hours, vacations, sick leave, etc., were concerned. The great power of these combinations over a small business man or retailer was more than sufficient in most cases to compel such small retailer or businessman to hire help which the Union demanded be employed, despite the fact that such employer had operated for many years without any help and in some cases the business did not operate profitably. In fact, such conduct on the part of some Unions amounted to nothing more than extortion. The Courts of the State of New York in shaping the public policy best suited to the inhabitants of that State declared that policy to be that where a person conducted a business without employing any employees a Union could not picket such employer for the purpose of compelling him to hire unnecessary help. In establishing this public policy the Courts of the State of New York did not prohibit picketing for all purposes where such employers were affected. The prohibition against picketing was directed solely against Unions when they sought to compel the hiring of unnecessary help. This was done for the purpose of eradicating the great social evil whereby one class of individuals combined into Unions were able, through the great power which such combinations gave them, to force tens of thousands of small business men to part with hard earned moneys and small profits which long hours of labor brought to them, in return for services which they did not require. It was inevitable that any State which would permit the power of trade unions to be exerted for such purposes would deprive small businesses of an opportunity of thriv-

ing and growing and in many cases permit an unwarranted drainage of capital from such small businesses to the point where bankruptcy and insolvency would result. In the interests of a sound public policy Unions were not permitted to use their power against a one-man business for the purpose of dictating how many employees or amount of employment such business should furnish. Thus, the constitutional right of such small business men to conduct their businesses without unjustified interference was protected.

By one stroke this Court has shattered this long established public policy and has removed the barrier of protection which these tens of thousands of small merchants had. Hereafter these business men will be left to the mercy and uncontrolled demands of trade unions. This will mean a return to the chaotic conditions which formerly prevailed whereby Unions would foist unnecessary help upon such helpless employers, the extent of their demands being based upon the bank balance or capital of the small enterprise. Thus the small savings or small income of such businesses will again be subject to unlimited raids and absorption by unscrupulous Unions. This can only lead to the eventual extinction of this class of proprietor and great social unrest and evil.

Statement by Counsel.

This application for rehearing is presented in good faith and not for the purpose of delay pursuant to Rule 33 of the Rules of the Supreme Court adopted February 13, 1939.

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents.

Of Counsel:
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ARTHUR STEINBERG.

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BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING.

POINT I.

The determination of the New York State Court of Appeals that the respondents may work alone without employing help and that the petitioners may not picket to compel the respondents to abstain from performing all their work, is binding on this Court.

The uncontradicted evidence shows that the Union sought to compel the respondents to abstain from performing all their work themselves. The Union demanded that the re-

spondents furnish one day's employment per week to members of the Union. The prohibition against picketing to effect such a purpose is solely a question of local policy to be determined by Court of Appeals of New York.

In an analogous situation this Court recently in the case of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, held that the law of the state as declared by the highest Court determines whether such activity may be permitted and that it was no concern of this Court what the public policy of the state was in this respect. There, Justice Brandeis said: "Whether it was wise for the state to permit the Union to do so is a question of its public policy—not our concern".

It is submitted that the reversal of judgment obtained by the respondents is in direct conflict with the principles of law recognized in the *Senn* case and intrudes into the state's realm of policy making. The Court further recognized the fact that it was for the State Court to decide whether such activity on the part of the Union, in furtherance of such an objective, was for a lawful or an unlawful end.

POINT II.

The New York Court of Appeals has held that picketing to compel an employer who operates a business alone to hire unnecessary help is in furtherance of unlawful purpose.

See:

Thompson v. *Bockhout*, 273 N. Y. 390;
Luft v. *Flove*, 270 N. Y. 640;
Boro Park Sanitary Live Poultry Market v. *Heller*, 280 N. Y. 481;
Goldfinger v. *Feintuch*, 276 N. Y. 281.

In the latter case the Court in referring to the *Thompson* and *Luft* cases declared that the "purpose" of picketing to compel the hiring of unnecessary labor "was unlawful".

POINT III.

Picketing in furtherance of an unlawful purpose may not be protected under the guise of freedom of speech.

Chief Justice Stone, in a concurring opinion in the recent case of *Hague, et al.* v. *C. I. O.*, 307 U. S. 496, said:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly *for any lawful purpose* are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444."

And, in the remaining portion of his opinion he reiterated the fact that freedom of speech and freedom of assembly is granted to all persons "for any lawful purpose".

Therefore, where the purpose be an illegal one, it is evident that freedom of speech cannot be relied upon to protect those who use picketing as a means of attaining an illegal objective.

Such a prominent guardian of civil liberty as Justice Cardozo, while sitting on the New York Court of Appeals bench, concurred in two outstanding opinions wherein the right of picketing to accomplish an illegal purpose was withdrawn from labor unions.

In the oft quoted case of *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 263, the Court said:

> "Where the end or the means are unlawful and the damage has already been done the remedy is given by criminal prosecution or by recovery of damages at law. Equity to be invoked only to give protection for the future. To prevent repeated violation, threatened or probable, of complainant's property rights an injunction may be granted. * * * Freedom to conduct a business, freedom of engaging in labor, each is like a property right. Threatened and unjustified interference with either will be prevented. * * * A combination to strike or to picket an employer's factory to the end of coercing him to commit a crime, or to pay a stale or disputed claim, would be unlawful in itself, although, for an individual, his intent in leaving work does not make wrongful the act otherwise lawful. His wrong, if wrong there be, would consist of some threat, of something beyond the mere termination of his contract with his employer. Likewise a combination to effect many other results would be wrongful. Among them would be one to strike or picket a factory where the intent to injure rests solely on malice or ill will. Another's business may not be so injured or ruined. It may be attacked only to attain some purpose in the eye of the law thought sufficient to justify the harm that may be done to others."

In *Interborough Rapid Transit Co.* v. *Lavin*, 247 N. Y. 83, the Court held:

> "In this state the courts may interpose their mandates between contesting parties only where there is attempt to effectuate an unlawful purpose, or to effectuate a lawful purpose by unlawful means. The privilege of freedom of contract may not be destroyed by

> force or fraud. Against the threatened use of such means the courts must exercise their full powers unflinchingly. Business and property rights in their broadest sense should be immune from malicious interference. They rest upon established principles of law; they are subject to attack within limits fixed by law."

In another case, *Nann* v. *Raimist*, 255 N. Y. 307, Mr. Justice Cardozo, after citing and quoting from *Exchange* v. *Rifkin*, said that a court of equity

> "intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with impairment by illegal combinations or by other tortious acts, the publication of the words being merely an instrument and incident."

This Court has also held likewise. See:

Gompers v. *Buck Stone and Range Co.*, 221 U. S. 418;
Darchy v. *Kansas*, 272 U. S. 306, 311;
Truax v. *Corrigan*, 257 U. S. 312.

That this should be the law is sound, because freedom of speech or picketing should not be permitted to assist those who pervert its legitimate use by employing it for objectives condemned by society in general. Otherwise, there will be no protection in cases where a representative of the Union might demand a lump sum of money under the threat of picketing if an employer under such circumstances were to refuse to become a party to such attempted extortion. It is inconceivable that any society would permit such representatives of labor to picket the premises of an employer under the pretext or feigned issue that he was unfair.

In the case at bar, after litigation was commenced, the Union sought to justify its conduct under the pretext that it was thereby seeking to solve the problem raised by the peddler system. However, the Trial Court refused to find that that was their purpose and, based upon the uncontradicted evidence, found that the primary purpose was to compel the hiring of unnecessary labor. Mr. Justice Holmes recognized this in *Aikens* v. *Wisconsin* (195 U. S. 194) where he said:

> "When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts when done maliciously cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

Mr. Justice Brandeis, in *Whitney* v. *California*, 274 U. S. 357, recognized the fact that freedom of speech might be suppressed in cases where reasonable ground existed to fear that serious evil would result if free speech was practiced. It cannot be denied that permitting picketing for the purpose of compelling small storekeepers and business men to hire unnecessary help will result in a great social evil.

It is significant to note that the Union in this case did not embark upon a program of picketing for the purpose of eradicating the so-called evil of peddler system, as was the case in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U. S. 91, but the picketing was undertaken here for the sole purpose of compelling the respondents

to employ unnecessary labor. The power of a state to protect the property of its residents from unjustifiable interference cannot be doubted (*Carlson* v. *California*, 310 U. S. 106; *Thornhill* v. *Alabama*, 310 U. S. 88).

Freedom of speech is not an absolute right and is subject to modification or qualification in the interest of the society in which employer and employee exist (*Thornhill* v. *Alabama*, supra). In determining when the right to freedom of speech is to be abridged or limited the "task falls upon the Courts to weigh the circumstances and to appraise the substantiality of the reasons advanced" (*Schneider* v. *Town of Irvington*, 308 U. S. 147).

POINT IV.

American Federation of Labor v. Swing, et al., has no application to the facts of this case.

This Court in reversing cited the *Swing* case apparently relying upon the claim made by the petitioner Union that the New York Court of Appeals affirmed the injunction on the ground that picketing was not permissible where no employer or employee relationship existed. It is submitted that this was not the ground upon which the injunction nor the affirmance was placed. Peaceful picketing was enjoined because the declared public policy of the State of New York does not permit a labor union to picket to compel an employer, who works alone in his business, to hire unnecessary help. The test is not whether there is an employer or employee relationship. The test is what purpose was the Union seeking to accomplish. The New York Court of Appeals has permitted picketing against a shopkeeper who had no help where the purpose of the picketing was to advise the public that this proprietor was selling a non-union product (*Goldfinger* v. *Feintuch*, supra). The New York Court of Appeals has for many years followed

the law as laid down in the *Swing* case. In fact, in a very recent decision, decided March, 1940, the New York Court of Appeals in a case identical to the *Swing* case held that picketing was permissible, despite the fact that no employer or employee relationship existed between those who were picketing and the employer (*May's Furs & Ready-Wear* v. *Bauer*, 282 N. Y. 331).

The petition and brief submitted by the Union herein would have this Court believe that the New York Court of Appeals has adopted a very narrow and unjustifiable position. On the contrary, that Court has blazed the trail in the past years in support of the rights of workers and has continued as the outstanding champion of the civil liberties of workers.

In the *Swing* case the only question presented was whether a state had a right to prohibit members of a union from picketing an employer's premises where the employer hired workers who were not members of the Union. Conceivably such an objective is a lawful one and our state was among the first to permit picketing for such purposes.

In another recent case by the New York Court of Appeals, *Baillis* v. *Fuchs*, 283 N. Y. 130, picketing was permitted although no employer or employee relationship existed.

The Union herein in its petition for a rehearing quoted from the case of *Opera-on-Tour* v. *Weber* (285 N. Y. 348) where the New York Court of Appeals in referring to its decision in this case, as well as *Thompson* v. *Boekhout*, said:

> "We have held that the attempt of a union to coerce the owners of a small business, who was running the same without an employee, to make employment for an employee, was unlawful objective and that this did not involve a labor dispute (*Thompson* v. *Boekhout*, 273 N. Y. 390). So, too, in a case that we unanimously decided, we held that it was an unlawful labor objec-

tive to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week (*Wohl* v. *Bakery and Pastry Drivers*, 284 N. Y. 220)."

In their petition, great stress was laid upon the word "coerce" and claim was made that thereby the Court of Appeals branded peaceful picketing as coercion. Furthermore, the petitioners distorted the clear meaning of the decision by stating "Stripped of the embellishments of legal art, the decision of the Court of Appeals in the case at bar is now plainly revealed as a holding that the defendant Union's peaceful and orderly efforts to inform the public of its policy with regard to the peddler system constitute 'an unlawful labor objective', and are therefore beyond the pale of constitutional protection." Petitioners, by their own interpretation, state that the Court of Appeals held that peaceful picketing to inform the public of the evils of a peddler system is an unlawful objective. The Court of Appeals *did not* hold this to be the law. That Court did not say that picketing in such cases was unlawful. The only point at issue was whether the respondents could be compelled to hire unnecessary help. The word "coerce" was used in the sense that the Court would not permit picketing, lawful in itself, to be used to foist unnecessary help upon the respondents. The mere fact that a labor union might feel that a peddler system is injurious to its members does not give it a right to extort money from small business men, nor does it give it the right to use pickets for the purpose of compelling such employers to commit a crime, or to fix the prices of commodities, or for many other reasons which have been condemned as contrary to the wellbeing of our society. The issue in this case was not whether peaceful picketing was permissible to expose the evils of a peddler system. The only issue was whether the respondents could be coerced into hiring the amount of help the Union sought to impose upon them.

It was only after litigation commenced that the Union first raised the peddler system in an attempt to justify its legal conduct. However, the uncontradicted testimony, as well as the findings of the Trial Court, as affirmed by the Appellate Courts, showed that the Union really relied upon the peddler system as a pretext, and that it was not advanced in good faith. This is evidenced by the fact that instead of conducting a program of picketing throughout the state generally to enlighten the public as to the evils of the peddler system, the Union merely demanded employment under the penalty of injuring the respondents' business. As was said in the case of *Auburn Draying Co.* v. *Wardell*, 178 App. Div. 270, affirmed 227 N. Y. 1:

> "The general argument of good to labor conditions cannot be made a cloak to shield the actors from the consequences of acts done in furtherance of the unlawful purpose. * * * If it be unlawful, it may not be shielded behind general arguments for real or fancied good to organized labor".

To the same effect, see also

Vonnegut v. *Toledo*, 263 Fed. 192, 202.

POINT V.

If it be a fact that the reversal of this Court was based upon its belief that picketing against the peddler system was prohibited, then the decision should be clarified as it is easily susceptible of construction that the employers operating without help can be subjected to picketing to compel them to hire employees even though not required.

This Court in its per curiam opinion reversed and merely cited the *Swing* case. The natural inference is that a state

may not prohibit picketing where a Union demands that an employer operating without help hire the number of employees dictated by the Union. To permit the decision to remain in its present form removes the protection given by the Courts of New York State to its numerous small proprietors of businesses.

This will undoubtedly lead to a return of chaotic conditions where unions were the sole persons to determine how much help such proprietors should employ. It is of paramount importance that this point be cleared up promptly so that the Courts of New York may be informed whether or not they still retain the power to prohibit such practices.

CONCLUSION.

The rehearing of the order granting the writ of certiorari and reversing the judgment of the Court of Appeals of the State of New York should be granted and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents.

Of Counsel:
JOSEPH APPEL,
ARTHUR STEINBERG.